87-1975

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

———o———

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

———o———

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QUESTIONS PRESENTED

1. Whether a search warrant document, resulting in the seizure of a large number of different magazines, is constitutionally sufficient where probable cause for obscenity is tied to the depiction of a single sexual act.

2. Whether a prior adversary hearing is constitutionally required when a search warrant authorizes the confiscation of an unlimited number of magazines, which are purportedly obscene because they contain a depiction of a single sexual act.

3. Whether a search warrant which predetermined obscenity and authorized executing officers to take any magazine that contained a depiction of a single sexual act is a constitutionally invalid general warrant.

4. Whether the procedure of combining a large number of magazines into a single count complaint, and the use of a general verdict form with accompanying special interrogatory, is constitutionally permissible.

5. Whether the failure of the Illinois Obscenity Statute to define the element of prurient interest renders said statute fatally overbroad under the First Amendment to the Constitution of the United States.

TABLE OF CONTENTS

Pages

Subject Index

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 12

Appendix Index

Exhibit A—Opinion of the Second District Appellate Court for the State of Illinois in *People v. Sequoia Books, Inc.*, No. 2-86-1030 ..... App. 1

Exhibit B—Order denying Petition for Leave to Appeal ..... App. 9

Exhibit C—Order staying mandate ..... App. 10

Exhibit D—Illinois Obscenity Statute, as effective prior to January 1, 1986 ..... App. 12

Exhibit E—Illinois Obscenity Statute, as revised effective January 1, 1986 ..... App. 15

TABLE OF AUTHORITIES

Pages

CASES

A Quantity of Copies of Books v. State of Kansas, 378 U.S. 205 (1964) 6, 7

Brockett v. Spokane Arcades, 472 U.S. 491, 105 S.Ct. 2794 (1985) 11

Eaton v. City of Tulsa, 415 U.S. 697 (1974) 9

Heald v. Mullaney, 505 F.2d 1241 (1st Cir. 1974) 9

Heller v. New York, 413 U.S. 483 (1973) 6

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) 6

Lo-Ji Sales Inc. v. New York, 442 U.S. 319 (1979) 6, 7

Marcus v. Search Warrants of Property, 367 U.S. 717 (1961) 6, 7

Maryland v. Macon, 472 U.S. 463 (1985) 6

Miller v. California, 413 U.S. 15 (1973) 7

New York v. P.J. Video, 475 U.S. 868 (1986) 6

People v. Sequoia Books, Inc., 160 Ill.App.3d 315, 513 N.E.2d 468 (1987), cert. pending No. 87-1646 ..... 5, 6, 8

Roaden v. Kentucky, 413 U.S. 496 (1973) 6

Speiser v. Randall, 357 U.S. 513 (1958) 10

Stanford v. Texas, 379 U.S. 476 (1965) 6

Street v. New York, 394 U.S. 576 (1969) 8

United States v. Guarino, 729 F.2d 864 (1st Cir. 1984) 8

United States v. Jackson, 542 F.2d 403 (7th Cir. 1976) 9

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 9

United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977) 8

TABLE OF AUTHORITIES—Continued

Pages

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257(3) 2

Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev. Stat. 3, 4, 10

United States Constitution, First Amendment 2, 4, 6, 8, 9, 11, 12

United States Constitution, Fourth Amendment 2, 4, 12

United States Constitution, Fourteenth Amendment 2, 4, 11, 12

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SEQUOIA BOOKS, INC.,[1]

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

—o—

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and unpublished opinion of the Appellate Court of the State of Illinois, Second District, entered on November 17, 1987.

---

[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, was an order pursuant to Illinois Supreme Court Rule 23 and thus, was an unpublished order with no precedential value. A copy of this order is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District.

A written opinion and order was issued by the Appellate Court on November 17, 1987. A timely filed Petition for Leave to Appeal to the Illinois Supreme Court was denied on April 7, 1988, a copy of which denial is included in the Appendix as Exhibit B. The petitioner filed an Affidavit of Intent to Seek Review in the United States Supreme Court and a Motion to Stay the Mandate With the Illinois Supreme Court. On April 26, 1988, the motion to stay was granted, and a copy of the order staying the mandate is included in the Appendix as Exhibit C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and

the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat. (1985), and as revised effective January 1, 1986, are set forth in the Appendix as Exhibits D and E.

———o———

STATEMENT OF THE CASE

The petitioner in this case is Sequoia Books, Inc., the corporate owner and operator of the Denmark Bookstore, an adult bookstore located at 1300 Business 30 West, Aurora, Illinois. This bookstore sells sexually explicit materials to adults over the age of 18 years and admittance to the bookstore is restricted.

On March 27, 1986, an Illinois State Police investigator entered petitioner's business premises and purchased three magazines. On March 28, 1986, he presented those magazines along with a complaint for search warrant, and in an accompanying affidavit the officer indicated that he had observed depictions of sexual acts in at least 100 magazines while browsing in the bookstore over a 60 minute period. Circuit Judge James W. Wilson issued a search warrant which authorized the search of the Denmark Bookstore and the seizure of magazines containing "depictions or portions thereof" of enumerated acts of sexual intercourse.

On March 28, 1986, two Illinois State Police investigators and two Kendall County officers entered the Denmark Bookstore and seized 224 different magazines under the purported authority of the search warrant. The seizure of each magazine was accompanied by a review of the cover and/or a few pages inside the magazine for a few

minutes. The search and seizure of the 224 magazines lasted approximately one and one-half hours. The officers at no time made any reference to the tripartite test for obscenity and were guided solely by the language of the warrant which authorized the seizure of a magazine which contained a depiction of one of the enumerated acts.

On April 6, 1986, a criminal complaint was filed in one count which alleged that Sequoia Books, Inc., d/b/a Denmark II, had committed the offense of obscenity in violation of Ch. 38, § 11-20, Ill.Rev.Stat. (1985), by offering obscene magazines for sale. This single-count complaint incorporated by reference a list of the 224 magazines seized in the search warrant procedure.

The defendant pleaded not guilty and filed a pretrial motion to quash the search warrant, suppress evidence, and order return of the items seized as being taken in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States. This motion was denied after an evidentiary hearing.

The defendant also filed a motion to dismiss alleging that the Illinois Obscenity Statute was unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, and that the complaint improperly allowed the joinder of 224 separate items in a single-count charging obscenity. After hearing and argument this motion was also denied.

The cause was called for a jury trial. The jury was instructed that if they found any one magazine to be ob-

scene they should find the defendant guilty. In addition to a general verdict the jury was also tendered a special interrogatory in which they were asked to designate "yes" or "no" on each of the 224 magazines on the list attached to the complaint. The defendant's tendered instructions which would require the jury to find all charged magazines obscene before the defendant could be found guilty were rejected.

The jury returned a verdict of guilty and the defendant's timely filed post-trial motion was denied. The defendant was sentenced to pay a fine and costs.

On appeal before the Second District Appellate Court the defendant questioned the constitutional validity of the search and seizure procedure, the Illinois Obscenity Statute for its failure to define "prurient interest", and the joinder of the 224 magazines in a single-count complaint. In an unpublished order entered November 17, 1987, Second District Appellate Court rejected all of the arguments raised by the petitioner. In doing so the court relied on its previous opinions addressing these or similar issues, e.g. *People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 513 N.E.2d 468 (1987) (cert. pending No. 87-1646).

Following the April 7, 1988 denial of leave to appeal by the Illinois Supreme Court petitioner seeks certiorari review.

———o———

REASONS FOR GRANTING THE WRIT

I.

THE SEARCH WARRANT PROCEDURE UTILIZED IN THIS CASE WAS CONSTITUTIONALLY INVALID BECAUSE IT CONSTITUTED A GENERAL WARRANT, THERE WAS NO SEARCHING FOCUS ON THE ISSUE OF THE OBSCENITY OF THE MAGAZINES TO BE SEIZED, AND THE SEIZURE AMOUNTED TO A PRIOR RESTRAINT.

This case presents for review the identical issue of a massive search and seizure which has imposed a system of prior restraint on the petitioner's bookstore, in another case now pending before this court. (See *Sequoia Books, Inc. v. Illinois*, No. 87-1646) This Court has consistently condemned large scale search and seizure procedures where First Amendment interests are involved. *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964); *Stanford v. Texas*, 379 U.S. 476 (1965); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973). This Court only recently reaffirmed these fundamental constitutional principles in *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319 (1979); *Maryland v. Macon*, 472 U.S. 463 (1985).

Indeed, in its most recent case of this nature, *New York v. P.J. Video*, 475 U.S. 868 (1986), this Court emphasized its long-standing requirement of special conditions on seizures involving First Amendment implications. The Court in *P.J. Video* approved a search and seizure at a bookstore upon a finding that the procedure permitted a searching focus on the issue of the obscenity

vel non of material to be seized. The Court observed that the affidavits attached to a search warrant must provide a factual basis, utilizing a standard of probable cause, to focus on the issue of obscenity as to the specific materials to be seized.

In the present case, none of the fundamental constitutional requirements set forth in the decisions of this Court have been met. The search warrant documents, including the complaint and affidavit, do not establish probable cause that materials not reviewed are obscene. The fact that a magazine may have a depiction of a single sexual act fails to establish probable cause that the three components of the tripartite test of *Miller v. California,* 413 U.S. 15 (1973), have been met. The judge who issued the warrant never had the opportunity to apply the test for obscenity to any of the magazines that were ultimately seized.

Further, a clear constitutional deprivation to the petitioner in this case is the imposition of a system of prior restraint. The discretion to determine what to seize emanated not from the judge, but was given completely to the police officers who decided what should be seized based on a review of the cover and/or a few pages inside a magazine. Where large numbers of items are taken, such as the 224 items in this case, this Court's holdings in *Marcus, Quantity* and *Lo-Ji Sales* require a prior adversary hearing. The failure of such hearing in this case renders the search and seizure process constitutionally invalid.

The holding in the unpublished order by the Second District Appellate Court in this case ignores this Court's historical condemnation of general warrants in search and

seizure procedures with First Amendment implications. The Appellate Court's decision is in direct conflict with the decision of two circuits, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). This Court should acknowledge the significance of the constitutional issues presented by this case and resolve the conflict with the Federal circuits by grant of certiorari.

II.

THE COMBINATION OF A LARGE NUMBER OF MAGAZINES INTO A SINGLE COUNT COMPLAINT, AND THE USE OF A GENERAL VERDICT FORM WITH ACCOMPANYING SPECIAL INTERROGATORY, PERMITTED THE CONVICTION OF THE DEFENDANT FOR THE DISSEMINATION OF PROTECTED SPEECH AND CREATED A SYSTEM OF PRIOR RESTRAINT.

The issue presented with regard to the joinder of 224 separate items in a single-count complaint is also pending before this Court in *Sequoia Books, Inc. v. Illinois*, No. 87-1646. In this case, however, 224 magazines were included under one count.

This Court has clearly stated the proposition that the joinder of protected and unprotected conduct in a single-count complaint is constitutionally invalid. In *Street v. New York*, 394 U.S. 576 (1969), the defendant was charged with a single count violation of desecrating a flag by burning it and by oral statements. This Court reversed the defendant's conviction stating:

> [W]hen a single count indictment or information charges the commission of a crime by virtue of the defendants having done both a constitutionally protected act and one which may be unprotected, and a

> guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together . . . (omitting citations). There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilty on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.
>
> 394 U.S. at 588 (footnote omitted)

See also, *Eaton v. City of Tulsa,* 415 U.S. 697 (1974).

The single-count method and special interrogatory used in the present case provide no meaningful scrutiny to determine the protected from the unprotected. Indeed, the use of the special interrogatory suggests and even coerces the eventual result of the finding of obscenity as to all 224 magazines. Not surprisingly, special interrogatories in criminal cases are routinely disapproved. *United State v. Jackson,* 542 F.2d 403 (7th Cir. 1976); *United States v. Spock,* 416 F.2d 165 (1st Cir. 1969). Indeed, the Appellate Court's reliance in its unpublished decision on *Heald v. Mullaney,* 505 F.2d 1241 (1st Cir. 1974), demonstrates a conflict at least insofar as First Amendment implications are raised in a criminal case.

Each magazine in the present case was entitled to a specific and separate consideration apart from the other magazines that were seized and were the subject of the charge. Where a general verdict is used, however, no twelve jurors are actually required to unanimously agree upon the obscenity of any one magazine. The use of the general verdict and special interrogatory certainly are not

the type of "sensitive tools" necessary to delineate protected from unprotected speech. *Speiser v. Randall,* 357 U.S. 513 (1958). This Court should grant certiorari, address a seeming conflict on the question of using special interrogatories, and also recognize the significant constitutional issue presented herein.

III.

THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONAL FOR ITS FAILURE TO DEFINE PRURIENT INTEREST.

The Illinois Obscenity Statute, as amended effective January 1, 1986, defined obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or similated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.
>
> Ill.Rev.Stat., Ch. 38, § 11-20(b) (1987)

Prior to the amendments to the Illinois Obscenity Statute, effective January 1, 1986, that statute defined prurient interest as a "shameful or morbid interest in nudity, sex or excretion." See Ch. 38, § 11-20(b), Ill.Rev.Stat. (1983). The amendments, however, dropped out the definition of appeal to prurient interest thereby rendering the amended statute unconstitutionally vague and overbroad.

Recently this Court in *Brockett v. Spokane Arcades*, 472 U.S. —, 105 S.Ct. 2794 (1985), recognizes special problems with the term "prurient interest" and its susceptibility to varying definitions. In striking down as unconstitutional the statutory definition of "prurient interest" that included appeal to "lust" this Court pointed out the danger in a statute with such a broad sweep. For material which would appeal to the average adults normal curiosity about sex could fall within the purview of a statute which did not properly define prurient interest thus, including constitutionally protected speech under a statute's prescription. It is submitted the same risk is present in the amended obscenity statute under scrutiny in this case.

Because of its conflict with the decision in *Brockett v. Spokane Arcades*, this Court should reject the holding of the Illinois Appellate Court in its unpublished opinion saving the Illinois Obscenity Statute despite its failure of definition of "prurient interest" as being violative of the First and Fourteenth Amendments to the Constitution of the United States.

———o———

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and order of the Appellate Court of the State of Illinois, Second District, because of the significant issues presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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May, 1988.

APPENDIX

EXHIBIT A

No. 2-86-1030

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 16th Judicial Circuit, Kendall County, Illinois.
Plaintiff-Appellee,	)	
v.	)	
	)	No. 86 CM 76
SEQUOIA BOOKS, INC.,	)	
Defendant-Appellant.	)	The Honorable Wilson D. Burnell, Judge Presiding.

ORDER PURSUANT TO
SUPREME COURT RULE 23

(Filed November 17, 1987)

Defendant, Sequoia Books, Inc., was charged with obscenity (Ill. Rev. Stat. 1985, ch. 38, par. 11-20(a)(1)) in a criminal complaint filed in the circuit court of Kendall County. Following a jury trial, defendant was found guilty and was sentenced to pay fines totalling $1,015.50 and costs totalling $88. Defendant appeals from this conviction.

On March 28, 1986, 224 different magazines were seized at the Denmark II bookstore pursuant to a search warrant. A criminal complaint was filed on April 1, 1986, alleging:

"That on the 28th day of March 1986, * * *, SEQUOIA BOOKS, INC., * * *, d/b/a DENMARK II

> committed the offense of OBSCENITY in that said defendant, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content of the obscene magazines thereof contained in Exhibit "1" [a list of the titles of the 224 seized magazines] which is attached and incorporated herein by reference, offered such obscene magazines for sale, in violation of [the obscenity statute]." (Ill. Rev. Stat. 1985, ch. 38, par. 11-20(a)(1).)

A jury found defendant guilty of this charge on September 16, 1986, and defendant was sentenced on October 21, 1986.

Defendant argues that: (1) the search in which the 224 magazines were seized "violated defendant's rights under the First, Fourth and Fourteenth Amendments to the Constitution of the United States"; (2) the current obscenity statute (Ill. Rev. Stat. 1985, ch. 38, par. 11-20) is unconstitutionally indefinite, vague and overbroad because it does not define prurient interest; (3) the jury was improperly instructed in that (a) "the jury was not informed that they had to find all three elements of the definition of obscenity at the same time to make a determination of obscenity as to a magazine" and (b) "the jury was not informed that in making a determination on the issue of obscenity that they should take into account the context of dissemination"; (4) "the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States were violated by the duplicitous method of prosecution, utilizing a single count complaint for a large number of allegedly obscene magazines,

and the use of a general verdict form, accompanied by a special interrogatory;" and (5) the State failed to prove defendant's guilt of obscenity beyond a reasonable doubt. We affirm.

Defendant first argues that the search warrant procedure utilized did not meet the strict requirements necessary when first amendment freedoms are implicated in that: (1) the search warrant application and supporting documents failed to meet the standard of probable cause; (2) the search warrant was overlybroad and allowed the seizure of protected, as well as unprotected, material; and (3) the warrant process utilized was itself designed to do economic harm to the operation of defendant's bookstore. Defendant concedes that this court's opinions in *People v. Patroff* (1986), 141 Ill. App. 3d 483, 487-88, 490 N.E.2d 148, 151-52, *cert. denied* (—), — U.S. —, 93 L.Ed.2d 177, 107 S. Ct. 251, and *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, 1059-63, 495 N.E.2d 1292, 1295-98, *cert. denied* (1987), — U.S. —, 95 L.Ed.2d 855, 107 S.Ct. 2200, are dispositive of the search warrant issues raised and are contrary to defendant's position. Our recent decision in *People v. Sequoia Books, Inc.* (Nos. 2-86-0563 and 2-86-0577, 1987) — Ill. App. 3d —, — N.E.2d —, slip op. at 6-7, also decided the issues defendant raises regarding the search warrant contrary to defendant's position. We decline defendant's invitation to reconsider our prior cases on this subject, and so find no merit in defendant's argument that the search of the bookstore and seizure of the 224 magazines were improper.

Defendant next argues that the obscenity statute under which it was prosecuted and convicted (Ill. Rev. Stat.

1985, ch. 38, par. 11-20), which was effective January 1, 1986, is unconstitutional because it does not define "prurient interest." We have recently decided this issue contrary to defendant's position in two cases. (*People v. Sequoia Books, Inc.* (Nos. 2-86-0563 and 2-86-0577, 1987), — Ill. App. 3d —, — N.E.2d —, slip. op. at 9-10; *People v. Sequoia Books, Inc.* (No. 2-86-0916, 1987), — Ill. App. 3d —, —, — N.E.2d —, —, slip op. at 6-9.) We see no reason to deviate from our recent decisions of this issue and so conclude that the statute is not unconstitutional by virtue of its failure to define "prurient interest."

Defendant next contends that the jury was improperly instructed in two respects. First:

> "The jury was not informed that they had to find all three elements of the definition of obscenity at the same time to make a determination of obscenity as to a magazine."

Second:

> "The jury was not informed that in making a determination on the issue of obscenity that they should take into account the context of dissemination."

Neither of these claims has merit.

In regard to the first of these claims, the jury received the following instruction:

> "A magazine is obscene if:
>
> 1. the average person, applying contemporary adult community standards, would find that the work, taken as a whole, appeals to the prurient interest; *and*

2. the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibitions of the genitals; *and*

3. taken as a whole, it lacks serious literary, artistic, political or scientific value.

In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State." (Emphasis added.)

As can be seen from the instruction given, the jury was informed that all three of the elements of obscenity needed to be present for a magazine to be found "obscene." (*People v. Morrison* (1985), 138 Ill. App. 3d 595, 599, 486 N.E.2d 345, 348, *vacated on other grounds sub nom. Pope v. Illinois* (1987), — U.S. —, 107 S. Ct. 1918, 95 L.Ed.2d 439.) Defendant's claim that the jury was not so informed is therefore without merit.

Defendant's other claim regarding the jury instructions is that the trial court erred in not informing the jury that it should take the context of dissemination of a magazine into account in determining whether the magazine is obscene. We recently decided that the refusal of an instruction doing this was not erroneous (*People v. Sequoia Books, Inc.* (Nos. 2-86-0563, 2-86-0577, 1987), — Ill. App. 3d —, —, — N.E.2d —, —, slip op. at 12-13;

People v. Sequoia Books, Inc. (No. 2-86-0916, 1987), — Ill. App. 3d —, —, — N.E.2d —, —, slip. op. at 13-15), and see no reason to deviate from our recent decisions on this issue.

In its fourth issue, defendant contends that the procedure of combining 224 magazines into a single count and utilizing a general verdict with a special interrogatory as to the obscenity of the individual magazines was improper. This again, is an issue which we recently resolved adversely to defendant's position in *People v. Sequoia Books, Inc.* (Nos. 2-86-0563, 2-86-0577, 1987), — Ill. App. 3d —, —, —, — N.E.2d —, —, slip op. at 13-16. To our resolution of the issue there, we will only add the that the jury in the case at bar found all 224 magazines obscene, so defendant has a less compelling factual situation on which to raise this issue than in the case we recently decided where the two juries involved found several of the magazines were not obscene. See *People v. Sequoia Books, Inc.* (Nos. 2-86-0563, 2-86-0577, 1987), — Ill. App. 3d —, —, — N.E.2d —, —, slip op. at 6.

In its final issue, defendant contends that the State failed to prove its guilt of obscenity beyond a reasonable doubt because the State presented no evidence of community standards while defendant:

> "[A]dduced substantial proof regarding community standards through the testimony and exhibits relating to a public opinion poll, and the testimony and exhibits regarding the availability and acceptance of comparable materials from across the State of Illinois."

In fact, the record indicates that no evidence of community standards was presented by either party. Specifically, defendant presented no evidence regarding a public opinion poll or the availability and acceptance of comparable materials across Illinois.

In Illinois, the State is not required to present evidence of contemporary community standards in an obscenity case. (*People v. Ridens* (1972), 51 Ill. 2d 410, 415-16, 282 N.E.2d 691, 694-95, *vacated on other grounds* (1973), 413 U.S. 912, 37 L.Ed.2d 1030, 93 S. Ct. 3046; *City of Chicago v. Kimmel* (1964), 31 Ill. 2d 202, 206, 201 N.E.2d 386, 388.) Defendant's attempt to distinguish *Ridens* and *Kimmel* on the ground that "[i]n both of those cases the defendant adduced no evidence of contemporary community standards" fails because that is true of the case at bar as well. Thus, the evidence in the case at bar is not insufficient due to the State's failure to present evidence of contemporary community standards. On the record before us, we need not decide whether the State must present evidence of contemporary community standards to rebut evidence on that subject presented by a defendant, and so we decline defendant's invitation to reconsider *People v. Hall* (1986), 143 Ill. App. 3d 766, 771-73, 491 N.E.2d 757, 762-63, *cert. denied* (1987), — U.S. —, 95 L. Ed.2d 855, 107 S. Ct. 2200. See *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, 1063-64, 495 N.E.2d 1292, 1298, *cert. denied* (1987), — U.S. —, 95 L.Ed.2d 855, 107 S. Ct. 2200 ("It would appear that defendant is arguing that a jury must depend solely upon the evidence submitted to it when determining the 'statewide community standard' they will follow and may not rely on common sense or experiences in life in arriving at the applicable

community standard in the State. In essence, defendant would require the jury to accept its surveys and experts' opinions as establishing the statewide community standard. This proposition is unsupported.").

The judgment of the circuit court of Kendall County is affirmed.

Affirmed.

LINDBERG, P.J., WOODWARD and DUNN, JJ., concur.

EXHIBIT B

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
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April 7, 1988

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No. 66272—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 29, 1988.

EXHIBIT C

GENERAL NO. 66272

IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of the Second District No. 2-86-1030
Plaintiff-Appellee-Respondent,	)	From the Circuit Court of the 16th Judicial Circuit, Kendall County, Illinois Trial Court No. 86-CM-76
vs.	)	
SEQUOIA BOOKS, INC.	)	
Defendant-Appellant-Petitioner.	)	Honorable Wilson Burnell Judge Presiding

ORDER

(Filed April 26, 1988)

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied for, and mandate of this court shall, upon proof of such

filing being made by affidavit filed with the Clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

/s/ Thomas J. Moran
JUSTICE, SUPREME
COURT OF ILLINOIS

EXHIBIT D

Illinois Obscenity Statute
Ill.Rev.Stat. (1985) ch. 38, ¶ 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which make it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertise or otherwise promotes the male of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defînal.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in de-

scription or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicly indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT E

Ill. Rev. Stat. Ch. 38, ¶ 11-20 (1985)

(As revised effective 1/1/86)

11-20. *Obscenity*

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

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(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, apply-

ing contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibit of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific values.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistics, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people.

(3) The artistics, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or abscence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

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It shall be an affirmative defense to obscenity that the dissemination:

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(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

Supreme Court, U.S.
FILED
AUG 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the search warrant procedure comply with constitutional authority? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Is the Illinois statute invalid for providing no definition of the term "prurient"?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINION BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I.	
THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS	3
II.	
THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER	7
III.	
THE ILLINOIS STATUTE IS NOT INVALID FOR FAILING TO PROVIDE A DEFINITION OF "PRURIENT"	9
CONCLUSION	11

TABLE OF AUTHORITIES

	PAGE
Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794 (1985)	9, 10
Heald v. Mullaney, 505 F.2d 1241 (1st Cir. 1974)	8
Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973)	9, 10
New York v. P.J. Video, 475 U.S. 868 (1986)	3
People v. Sequoia Books, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986)	5
People v. Sequoia Books, 146 Ill.App.3d 1, 496 N.E. 2d 740 (2nd Dist. 1986)	5
People v. Sequoia Books, 150 Ill.App.3d 211, 501 N.E.2d 856 (2nd Dist. 1986)	5
People v. Sequoia Books, Nos. 2-86-563 and 2-86-577 (1987) (cert. pending)	5, 7
Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969)	7
United States v. Guarino, 729 F.2d 864 (1st Cir. 1984)	5, 6
United States v. Spock, 416 F.2d 165 (1st Cir. 1969)	8
United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977)	5, 6

IN THE

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PEOPLE OF THE STATE OF ILLINOIS,

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On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the petitioner does not raise any issues worthy of review.

OPINION BELOW

The opinion below, dated November 17, 1987 in cause No. 2-86-1030, is uncited pursuant to Illinois Supreme Court Rule 23. A copy is reprinted in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Sequoia Books, owns and operates the Denmark Bookstore in Aurora, Illinois. It was charged by complaint with obscenity in Kendall County, Illinois, and found guilty September 16, 1986 after a jury trial. It was sentenced to a fine of $1,015.50 and costs of $88.

The charge of obscenity arose after a Kendall County judge issued a search warrant, supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate. Pursuant to a warrant limiting seizure to magazines portraying specifically described sexual acts, authorities seized 224 such magazines on March 26, 1986.

Two days later, March 1, 1986, the criminal complaint was filed, alleging a single count of obscenity based on all 224 magazines. At trial, all 224 magazines were introduced. Sequoia Books did not present any evidence on its own behalf. Before deliberation, the jury was instructed and given a single general verdict form, along with special interrogatories requiring the jury to answer "yes" or "no" as to the obscenity of each of the magazines. The jury found all 224 magazines obscene.

On direct appeal, petitioner raised five allegations of error, including the three claims he raises in his petition to this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Sequoia Books alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. Despite Sequoia Books' claim to the contrary, the search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the policy may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. Rather, large-scale seizure must be preceded by an adversarial hearing on the obscenity question before the search can take place. But it is a defendant's burden to make the pretrial showing of a

"substantial" prior restraint before such an adversarial hearing need take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity, not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. Despite petitioner's contrary claim, the judge who issued the warrant after an adversarial hearing did searchingly focus on the obscenity of the magazines to be seized. The judge made sure that the warrant application was supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate for his review. This gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize such magazines.

Moreover, the warrant was not a general one which left total discretion to the executing officers as to what items and what quantity was to be seized is refuted. Rather, the officers were limited to seizing only the magazines that portrayed the sexual acts specifically described on the warrant.

Nor did the issuance of the warrant constitute a prior restraint. A prior restraint occurs only when the police rely on exigent circumstances to dispense with the warrant requirement and make a large-scale seizure. There

is no prior restraint, even where there is a large-scale seizure, so long as the police first obtain a warrant after an adversarial hearing on the obscenity question. Moreover, it is defendant's own burden to prove the prior restraint before the holding of the adversarial hearing. Thus, there was no prior restraint in this case since the State secured a warrant after an adversarial proceeding and since Sequoia Books never proved the existence of a substantial prior restraint before the seizure took place.

Because of this failure, there is no evidence that Sequoia Books was in any way economically harmed, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *People v. Sequoia Books*, 150 Ill. App. 3d 211, 501 N.E.2d 856 (2nd Dist. 1986) and *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. pending). Therefore, Sequoia Books has failed to show the existence of a constitutional error that needs correction by this Court.

Sequoia Books also claims that the Illinois Appellate Court's refusal to condemn these warrants as general warrants cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois Appellate Court opinion. These opinions agree that 1) a search warrant must define what is

to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that 2) probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The warrant authorized the officers to seize only those magazines depicting specifically defined acts. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. The affidavit of the investigator demonstrated that he himself saw how the magazines were displayed in the Denmark Bookstore and he particularly described the specific sex acts that he saw depicted in them. The issuing magistrate also had the opportunity to observe several of these same magazines. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

II.

THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.

Sequoia Books asks this Court to review the procedure of seeking a single conviction based on numerous magazines because it resulted in constitutional error. He claims that the single count method constituted a prior restraint by denying the jury the opportunity to specifically consider each magazine and creating the probability that no 12 jurors unanimously agreed upon the obscenity of any one magazine. The use of special interrogatories to assure specific consideration did not prevent the error but actually expanded the strict elements of the offense and potentially infringed on the jury's freedom.

However, constitutional error did not occur here. Illinois sought a single conviction for obscenity based on any of 224 individual magazines. To assure, in each case, that all twelve jurors gave specific consideration to all the material, the jurors were required to answer special interrogatories as to the obscenity of each magazine. This procedure was earlier approved in Illinois in *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. pending).

This Court saw in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground

of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. These demonstrated that all 224 magazines were deemed obscene and supported its single verdict. This procedure assured that whole jury specifically considered each magazine and reached unanimous agreement before finding any single magazine to be obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it made it possible to return any non-obscene books to the petitioner, and it lessened the collective impact of the material. Moreover, it exposed petitioner to only one obscenity conviction, rather than 223 additional convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. *See Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading it to conclude that a defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Dist. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it met its duty. Had the jury been instructed in the man-

ner requested by petitioner, its function would have been identical: to examine each magazine and determine whether or not it was obscene. Moreover, as already explained, Sequoia Books actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

THE ILLINOIS STATUTE IS NOT INVALID FOR FAILING TO PROVIDE A DEFINITION OF "PRURIENT."

Sequoia Books asks this Court to hold the Illinois Obscenity statute unconstitutional for failure to provide any definition of the term "prurient". The challenge is premised on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985) where a definition of "prurient" provided in a Washington obscenity statute swept too broadly. However, this Court need not intervene since neither *Brockett* nor any constitutional authority requires a definition of the term "prurient".

The Illinois statute defines obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

This definition is virtually a word-for-word copy of the definition this Court provided in *Miller v. California*, 413

U.S. 15, 93 S.Ct. 2607 (1973). In fact, the legislative debates indicate that Illinois' obscenity definition is meant to be totally compatible with the holding of *Miller v. California.* (P.A. 84-709, Section 1, 84th Gen. Ass., 1985; Senate Debates, 84th Gen. Ass., May 8, 1985, pp. 138-139; House Debates, 84th Gen. Ass., June 24, 1985, pp. 160-164).

The term "prurient" is not specifically defined. Rather, it appears in the same way it appears in *Miller.* In footnote 13 of *Brockett,* this Court noted that obscenity statutes which leave the term undefined or which define it only by case law have been upheld. In fact, in most states the term "prurient" is not defined, but this has not rendered the statutes invalid. *Brockett,* 105 S.Ct. at 2802, n.13. *Brockett* contemplates only that, where a state does undertake to define the term "prurient," it may not do so in a way that includes a normal interest in sex.

The Illinois statute is clearly constitutional under *Miller* and *Brockett.*

CONCLUSION

Wherefore, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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